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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. LUIS ALBERTO ORTEGA, Appellant.	2 CA-CR 2009-0071 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR2008-00108

Honorable James L. Conlogue, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Jonathan Bass — Tucson
Attorneys for Appellee

Ronald Zack — Tucson
Attorney for Appellant

K E L L Y, Judge.

¶1 Appellant Luis Ortega appeals his convictions and sentences for first-degree burglary, aggravated assault, attempted aggravated robbery, and attempted armed robbery. He argues that the trial court erred in imposing consecutive sentences for certain convictions, instructing the jury on dangerous offenses, denying his motion to suppress his pretrial identification, and denying his motions for acquittal on all charges and mistrial based on a witness's improper testimony. We affirm.

Background

¶2 On appeal, we view the facts in the light most favorable to sustaining Ortega's convictions and sentences. *See State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). In February 2008, Ortega and three others, Brent Mulvaney, Cassie Conner, and Mark Aurigemma, went to the home of V.C. to collect a drug debt from V.C.'s boyfriend, T.E. T.E. lived with V.C. and her three children.

¶3 The group forced its way into the house, shouting and demanding money. V.C. repeatedly yelled at them to leave. Ortega carried a baseball bat, and codefendant Aurigemma carried a police baton. Aurigemma and Ortega beat T.E. with their weapons. Connor took several valuables from the home. After V.C. confronted Conner and took back one of the items, Conner said either "hit her" or "get her." Ortega hit V.C. in the face, resulting in severe injury and the eventual loss of her right eye.

¶4 Ortega and his companions were charged with a total of fifteen felony counts including attempted murder of V.C., first-degree burglary, four counts of kidnapping, three counts of aggravated assault of T.E. with a deadly weapon, two counts of aggravated assault of V.C. with a deadly weapon, aggravated assault of V.C. causing

serious physical injury, aggravated assault of V.C. causing "a fracture of any body part," armed robbery, and aggravated robbery.

¶5 Ortega was tried separately and a jury found him guilty of first-degree burglary, aggravated assault of V.C. causing serious physical injury, attempted armed robbery, and attempted aggravated robbery. The jury found each of these offenses had "involve[d] the use or threatening exhibition of a deadly weapon or dangerous instrument or the intentional or knowing infliction of serious physical injury upon another person."[1] The state alleged, and the jury found proven, three aggravating factors as to each guilty verdict: Ortega's actions had caused emotional harm, the offense had been committed to collect on a drug debt, and the offense had been committed in the presence of children. The trial court sentenced Ortega to presumptive, consecutive prison terms for burglary and aggravated assault, totaling eighteen years, and minimum sentences of four years for each robbery count, to be served concurrently with each other but consecutively to the burglary and assault sentences. This appeal followed.

Discussion

Consecutive Sentencing

¶6 Ortega first contends the trial court improperly imposed consecutive sentences for his convictions of first-degree burglary, attempted aggravated assault, and attempted robbery, arguing those charges arose from a single act. Section 13-116,

[1]The trial court granted Ortega's motion for a judgment of acquittal on one count of aggravated assault. The trial court declared a mistrial as to four counts: kidnapping of T.E., aggravated assault with a baseball bat upon T.E., aggravated assault with a baseball bat upon V.C., and aggravated assault upon V.C. which caused a fracture of any body part. The jury acquitted Ortega of the remaining counts.

A.R.S., prohibits the imposition of consecutive sentences for offenses arising out of a single "act or omission." *See also State v. Stock*, 220 Ariz. 507, ¶ 11, 207 P.3d 760, 762 (App. 2009) (court may not impose consecutive sentences if defendant's conduct constituted single act). "We review *de novo* a trial court's decision to impose consecutive sentences in accordance with A.R.S. § 13-116." *State v. Urquidez*, 213 Ariz. 50, ¶ 6, 138 P.3d 1177, 1179 (App. 2006).

¶7 To determine whether offenses arise out of a single act for purposes of § 13-116, we apply the following test set forth by our supreme court in *State v. Gordon*, 161 Ariz. 308, 315, 778 P.2d 1204, 1211 (1989):

> [W]e will . . . judge a defendant's eligibility for consecutive sentences by considering the facts of each crime separately, subtracting from the factual transaction the evidence necessary to convict on the ultimate charge—the one that is at the essence of the factual nexus and that will often be the most serious of the charges. If the remaining evidence satisfies the elements of the other crime, then consecutive sentences may be permissible under A.R.S. § 13-116. In applying this analytical framework, however, we will then consider whether, given the entire "transaction," it was factually impossible to commit the ultimate crime without also committing the secondary crime. If so, then the likelihood will increase that the defendant committed a single act under A.R.S. § 13-116. We will then consider whether the defendant's conduct in committing the lesser crime caused the victim to suffer an additional risk of harm beyond that inherent in the ultimate crime. If so, then ordinarily the court should find that the defendant committed multiple acts and should receive consecutive sentences.

¶8 Under *Gordon*, we first determine which offense was "the 'ultimate charge—the one that is at the essence of the factual nexus and that will often be the most serious of the charges.'" *Urquidez*, 213 Ariz. 50, ¶ 7, 138 P.3d at 1179, *quoting Gordon*,

161 Ariz. at 315, 778 P.2d at 1211; *see also State v. Alexander*, 175 Ariz. 535, 537, 858 P.2d 680, 682 (App. 1993) (ultimate crime "will usually be the primary object of the episode"). At trial, Ortega argued that each of the offenses emanated from the ultimate crime of first-degree burglary, but argues on appeal that aggravated assault was the ultimate crime.[2] The state maintains the trial court correctly determined first-degree burglary was the ultimate crime, and points out that first-degree burglary of a residential structure, a class two felony, is a more serious charge than aggravated assault, a class three felony. *See Gordon*, 161 Ariz. at 315, 778 P.2d at 1211 (ultimate charge "will often be the most serious of the charges"); *see also* A.R.S. §§ 13-1204(B), 13-1508(B).

¶9 In determining which was the "ultimate charge," we examine the elements of first-degree burglary. A person commits the less serious offense of residential burglary by "entering or remaining unlawfully in or on a residential structure with the intent to commit any theft or any felony therein." A.R.S. § 13-1507(A). To commit first-degree burglary, however, a person or accomplice must violate § 13-1507 and "knowingly possess[] explosives, a deadly weapon or a dangerous instrument in the course of committing any theft or any felony." § 13-1508(A). Therefore, although a conviction for residential burglary requires only the intent to commit a theft or felony, first-degree burglary requires the actual commission of a theft or felony.

[2]Noting that the ultimate charge is usually the most serious of the charged offenses under *Gordon*, 161 Ariz. at 315, 778 P.2d at 1211, Ortega argues that first-degree burglary was "essentially an ancillary crime to the assault, as the resulting injuries are of a more serious nature than the burglary." Ortega concedes that robbery was not the ultimate offense.

¶10 The evidence established Ortega's primary objective was to collect a drug debt from T.E. by intimidating T.E. or taking his property, and items were in fact taken from the home. The objective was not necessarily to assault V.C. We conclude, therefore, that for purposes of § 13-116, first-degree burglary was the ultimate charge here, because it is the more serious crime, and its elements encompass the primary object of the episode.

¶11 We next subtract the evidence necessary to convict on the ultimate charge of first-degree burglary and determine whether the remaining evidence is sufficient to obtain a conviction for aggravated assault, attempted armed robbery and attempted aggravated robbery.[3] *See State v. Carreon*, 210 Ariz. 54, ¶ 104, 107 P.3d 900, 920 (2005); *Gordon*, 161 Ariz. at 315, 778 P.2d at 1211.

First-degree Burglary and Aggravated Assault

¶12 After subtracting all facts necessary to the commission of first-degree burglary, we must determine whether the remaining evidence supports Ortega's conviction for aggravated assault. As set forth above, first-degree burglary requires a person to enter or remain unlawfully in a residential structure with the intent to commit any theft or felony therein while the person or an accomplice knowingly possesses a deadly weapon or dangerous instrument in the course of committing a theft or felony. §§ 13-1507(A), 13-1508(A). A person commits aggravated assault by "[i]ntentionally,

[3]Because the sentences for attempted armed robbery and attempted aggravated robbery were to run concurrently to each other, but consecutively to the sentences for first-degree burglary and aggravated assault, we need not undertake this subtraction analysis as between the robbery offenses themselves.

knowingly or recklessly causing physical injury to another person," A.R.S. § 13-1203(A)(1), while using a deadly weapon or dangerous instrument, A.R.S. § 13-1204(A)(2).

¶13 Ortega's argument on appeal is based on the ultimate charge of aggravated assault, but he concedes that "evidence remains to support the first-degree burglary conviction" when evidence needed to prove aggravated assault is subtracted from the factual situation. The evidence showed that Ortega remained unlawfully in the home, intending to take T.E.'s property, while his accomplice Aurigemma beat T.E. with a police baton. Subtracting these elements from the factual episode as a whole, sufficient evidence remains that Ortega intentionally caused serious physical injury to V.C. Therefore, application of the first *Gordon* factor suggests consecutive sentences may be permissible.

¶14 Proceeding to the next part of the *Gordon* test, we consider whether "'it was factually impossible to commit the ultimate crime without also committing the secondary crime.'" *State v. Anderson*, 210 Ariz. 327, ¶ 140, 111 P.3d 369, 400 (2005), *quoting Gordon*, 161 Ariz. at 315, 778 P.2d at 1211. First-degree burglary requires the "intent to commit any theft or any felony." §§ 13-1507(A), 13-1508(A). Ortega and his codefendants entered the residence to collect a drug debt from T.E., either by intimidating him or taking property, and could have accomplished this without assaulting V.C. Thus, it was factually possible for Ortega to commit first-degree burglary without also

committing aggravated assault upon V.C.[4] *See State v. Williams*, 182 Ariz. 548, 561, 898 P.2d 497, 510 (App. 1995) (reasoning factual impossibility does not exist where criminal objective for residential burglary is crime different than one committed while in residence), *citing State v. Runningeagle*, 176 Ariz. 59, 67, 859 P.2d 168, 177 (1993).

First-degree Burglary and Attempted Armed/Aggravated Robbery

¶15 Next, we must subtract all facts necessary to the commission of first-degree burglary to determine whether the remaining evidence supports Ortega's conviction for attempted armed robbery and attempted aggravated robbery. "A person commits robbery if in the course of taking any property of another from his person or immediate presence and against his will, such person threatens or uses force against any person with intent either to coerce surrender of property or to prevent resistance to such person taking or retaining property." A.R.S. § 13-1902(A). A person commits attempted armed robbery when, acting with a deadly weapon or dangerous instrument, he intends to commit robbery and makes an overt act toward that end. A.R.S. §§ 13-1904(A)(2), 13-1001. And a person commits attempted aggravated robbery if, in the course of attempting robbery as defined in § 13-1902, such person is aided by one or more accomplices actually present. A.R.S. §§ 13-1903, 13-1001.

¶16 Subtracting the evidence necessary to the commission of first-degree burglary, evidence remained that Ortega carried a bat as a show of force and that his

[4]Ortega relies on *Alexander*, 175 Ariz. at 538, 858 P.2d at 683, in arguing that his ultimate crime of aggravated assault could not have been committed without committing a residential burglary, since the victim was in her house when the crimes occurred. Because we conclude the ultimate offense was first-degree burglary, we need not address this argument.

accomplices were present. This suggests consecutive sentences were permissible under the first part of the *Gordon* test. We next consider whether it was factually impossible to commit the first-degree burglary without also committing the attempted armed or aggravated robbery. We conclude it was factually possible for Ortega to remain unlawfully in the home with the intent to commit a felony as Aurigemma assaulted T.E. with a police baton, without Ortega also arming himself with a baseball bat and demanding money from T.E., all while accompanied by accomplices.

Aggravated Assault and Attempted Armed/Aggravated Robbery

¶17 Finally, we must consider whether consecutive sentences were appropriate for the aggravated assault conviction and attempted armed robbery and attempted aggravated robbery convictions. The evidence showed codefendant Connor tried to take various items belonging to T.E., V.C., and her children, while Ortega was armed with a baseball bat. Subtracting evidence of Ortega's assault on V.C. causing serious physical injury, evidence remains to support convictions of attempted aggravated and attempted armed robbery. Thus, application of the first *Gordon* factor suggests consecutive sentences may be permissible. Further, it was factually possible for Ortega to assault V.C. without attempting to take property from the home or threatening T.E. with the use of force by carrying a baseball bat or having accomplices. This factual possibility also supports the imposition of consecutive sentences.

¶18 We need not proceed to the third *Gordon* factor because our analysis of the first two factors for each conviction has demonstrated that Ortega's conduct constituted multiple acts. *See Gordon*, 161 Ariz. at 315, 778 P.2d at 1211 (if analysis of first and

second factors indicates a single act under § 13-116, court "will then consider" third factor); *see also State v. Carreon*, 210 Ariz. 54, ¶¶ 104-06, 107 P.3d 900, 920-21 (2005); *Anderson*, 210 Ariz. 327, ¶ 143, 111 P.3d at 400 (determining offenses were not single act under § 13-116 after completing second part of *Gordon* analysis); *State v. Boldrey*, 176 Ariz. 378, 382-83, 861 P.2d 663, 667-68 (App. 1993) (explaining *Gordon* does not require reaching third factor if consecutive sentences are permissible under first two factors); *accord Urquidez*, 213 Ariz. 50, ¶ 9, 138 P.3d at 1179 (court proceeded to final *Gordon* factor because analysis of first and second factors not determinative). *But see State v. Roseberry*, 210 Ariz. 360, ¶¶ 58-62, 111 P.3d 402, 412-13 (2005) (reaching third part of *Gordon* analysis without discussion even though first two factors supported consecutive sentences); *Anderson*, 210 Ariz. 327, ¶ 144, 111 P.3d at 400-01 (same); *Runningeagle*, 176 Ariz. at 67, 859 P.2d at 177 (same). Accordingly, we conclude consecutive sentences were permissible under *Gordon* and § 13-116.

Dangerous Offense

¶19 Ortega next contends the trial court erred by improperly instructing the jury on the definition of a "dangerous offense" and the appropriate standard of proof. We review jury instructions as a whole to determine if they accurately reflect the law. *State v. Hoskins*, 199 Ariz. 127, ¶ 75, 14 P.3d 997, 1015 (2000). We will not reverse a jury verdict on the ground of erroneous jury instructions unless the instructions taken as a whole reasonably could have misled the jury. *State v. Gallegos*, 178 Ariz. 1, 10, 870 P.2d 1097, 1106 (1994); *see also State v. Norgard*, 103 Ariz. 381, 383, 442 P.2d 544, 546 (1968) ("Instructions must be considered as a whole, and no case will be reversed

because of some isolated paragraph or portion of an instruction which, standing alone, might be misleading."). In reviewing an instruction, "[w]e look at the language of the instruction in view of how a reasonable juror could have construed it." *State v. Sierra-Cervantes*, 201 Ariz. 459, ¶ 16, 37 P.3d 432, 435 (App. 2001). "If the instructions 'are substantially free from error, the defendant suffers no prejudice from their wording.'" *Gallegos*, 178 Ariz. at 10, 870 P.2d at 1106, *quoting State v. Walton*, 159 Ariz. 571, 584, 769 P.2d 1017, 1030 (1989). Ortega concedes he failed to object to the jury instructions at trial, so we review only for fundamental error. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005).

¶20 Before the jurors began deliberating, the judge instructed them that the state had to prove each element of the charges beyond a reasonable doubt and informed them that some of the jury verdict forms contained interrogatories. The following interrogatory was printed on the bottom of the verdict form for each count for which the jury found Ortega guilty: "Did this offense involve the use or threatening exhibition of a deadly weapon or dangerous instrument or the intentional or knowing infliction of serious physical injury upon another person?" The court did not, however, separately instruct the jury as to dangerous offenses. Ortega asserts on appeal that this was error and that the trial court should have instructed the jury separately on the definition of a dangerous offense under A.R.S. § 13-604,[5] the applicable burden of proof, and on the need for a unanimous finding. We disagree.

[5]Effective "from and after December 31, 2008," A.R.S. § 13-604 was repealed and its provisions with respect to the definition of "dangerous nature of the felony" formerly

¶21 As noted above, the trial court instructed the jury that in reaching its verdicts it was required to find Ortega guilty beyond a reasonable doubt. And, it included the interrogatories relating to the dangerousness of the offense on the verdict forms it gave to the jurors. When the court instructed the jury on how it should reach its verdicts, it told them the following:

> Your verdict must be unanimous. When you have reached a verdict, the foreman should sign the verdict form on the line marked foreperson. And there are also some questions on some of the verdict forms. It's a yes or no question. Those would be answered separately from the main verdict, and then there is another signature for the foreperson. You only need to answer the question if you are using that verdict form. That will make more sense when you get back into the jury room.

Although the trial court did not expressly explain to the jury it would be finding Ortega had committed a dangerous offense, its instructions did inform the jury that it should find unanimously, and beyond a reasonable doubt, that Ortega had committed an offense involving the use or threatening exhibition of a deadly weapon or dangerous instrument or the intentional or knowing infliction of serious physical injury upon another person. Thus, the trial court provided the jury with all of the instructions Ortega demands, albeit not specifically denominated as instructions on a dangerous offense. *Cf. State v. Barrett*, 132 Ariz. 106, 109, 644 P.2d 260, 263 (App. 1981) (dangerous offense found by jury

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found in § 13-604(P) were relocated to § 13-105(13) where these provisions became the definition for "dangerous offense." 2008 Ariz. Sess. Laws, ch. 301, § 10; *see also* A.R.S. § 13-105(13). We refer throughout this decision to the version of § 13-604 in effect at the time Ortega committed his offenses.

where "the jury's finding [on the crimes charged] required proof of the dangerous nature of the felony").

¶22 Ortega also maintains the "form of interrogatory did not pose a proper question" as to whether he had committed a dangerous offense. He contends the interrogatories resulted in a finding that was not sufficiently specific. *See State v. Parker*, 128 Ariz. 97, 98, 624 P.2d 294, 296 (1981). In order for the court to impose an enhanced sentence, the jury, as the trier of fact, must make a separate specific finding on the allegation of dangerousness. *Id.*

¶23 For an offense to be "dangerous" under § 13-604(P), the jury must find the offense involved "the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument or the intentional or knowing infliction of serious physical injury upon another." According to Ortega, because of the wording of the interrogatory, it is impossible to determine whether the jury unanimously found that Ortega had used a deadly weapon or dangerous instrument, or whether he had acted intentionally or knowingly. And, Ortega argues, because the trial court instructed the jury that aggravated assault causing serious physical injury could be committed knowingly, intentionally, or recklessly, there was no way to know what mental state the jury concluded he had acted with in assaulting V.C.

¶24 Relying on *State v. Bowling*, 151 Ariz. 230, 233, 726 P.2d 1099, 1102 (App. 1986), Ortega contends the jury must make a finding that the mental state of the defendant was knowing or intentional in order to find that the offense was of a dangerous nature. In contrast to *Bowling*, where the trial court had erred in imposing a sentence

enhancement for knowing or intentional infliction of serious physical injury even though the general verdict form did not rule out a reckless state of mind, 151 Ariz. at 322-33, 726 P.2d 1101-02, or *Parker*, in which the court had refused to submit the issue of dangerousness to the jury at all, 128 Ariz. at 98, 624 P.2d at 295, the jury here answered "yes" to the interrogatory on the aggravated assault verdict form: "Did this offense involve the use or threatening exhibition of a deadly weapon or dangerous instrument or the intentional or knowing infliction of serious physical injury upon another person?"

¶25 This was sufficient to satisfy the requirement for a separate specific finding of dangerousness. *See Parker*, 128 Ariz. at 98, 624 P.2d at 296 ("The finding of the dangerous nature of the felony must be submitted to the jury for a separate finding unless an element of the offense charged contains an allegation and requires proof of the dangerous nature of the felony."). The interrogatory stated the elements of a dangerous nature allegation and Ortega has not cited any authority for his apparent assertion that the jurors were required to agree as to the basis for the finding of dangerousness. *Cf. Carreon*, 210 Ariz. 54, ¶¶ 56-57, 107 P.3d at 912 ("[T]he jury had to find beyond a reasonable doubt that Carreon had been previously convicted of a serious offense, not any one crime in particular."); *State v. Herrera*, 176 Ariz. 9, 16, 859 P.2d 119, 126 (1993) (defendant entitled to unanimous verdict regarding whether offense has been committed but not entitled to unanimous verdict on precise manner in which offense was committed); *State v. Pena*, 209 Ariz. 503, ¶ 12, 104 P.3d 873, 876 (App. 2005) (jury need not unanimously agree on the manner in which defendant committed aggravated assault based on either serious physical injury or use of dangerous instrument). Nor has he

carried his burden of proof that the verdict was not unanimous. *See Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607.

¶26 Viewed as a whole, the jury instructions in this case accurately reflected the law. They clearly specified Ortega was presumed innocent and the state bore the burden of proving him guilty beyond a reasonable doubt on each element of the charged offenses and allegations of dangerousness. *See* A.R.S. § 13-115. Thus, the trial court did not improperly instruct the jury and no fundamental error occurred.

Photographic Lineup

¶27 Ortega next contends the trial court erred in denying his motion to suppress pre-trial identifications of him, which he claimed resulted from an unduly suggestive photographic lineup. He further argues the victims' prior identifications of him were so unreliable that the trial court abused its discretion in allowing the victims to identify him in court.

¶28 Before admitting evidence of a defendant's pre-trial identification, a trial court is required to determine whether the identification procedure was unduly suggestive and, if so, whether the identification was nonetheless reliable based on the totality of the circumstances. *See State v. Dixon*, 153 Ariz. 151, 154, 735 P.2d 761, 764 (1987); *State v. Dessureault*, 104 Ariz. 380, 384, 453 P.2d 951, 955 (1969). A photographic lineup is unduly suggestive if it "create[s] a substantial likelihood of misidentification by unfairly focusing attention on the person that the police believed committed the crime." *State v. Strayhand*, 184 Ariz. 571, 588, 911 P.2d 577, 594 (App. 1995). However, "[t]here is no requirement that the accused be surrounded by nearly identical persons." *State v.*

Gonzales, 181 Ariz. 502, 509, 892 P.2d 838, 845 (1995). "Rather, the law only requires that [the lineup] depict individuals who basically resemble one another such that the suspect's photograph does not stand out." *State v. Alvarez*, 145 Ariz. 370, 373, 701 P.2d 1178, 1181 (1985). "[S]ubtle differences" in appearance are insufficient to render a lineup unduly suggestive. *Dixon*, 153 Ariz. at 154, 735 P.2d at 764. We will not disturb a trial court's determination that a lineup was not unduly suggestive and its resulting denial of a defendant's motion to suppress absent a "clear abuse of discretion." *State v. Phillips*, 202 Ariz. 427, ¶ 19, 46 P.3d 1048, 1054 (2002).

¶29 At a hearing held pursuant to *Dessureault*, 104 Ariz. 380, 453 P.2d 951, detective Ursula Ritchie testified she had requested a photographic lineup containing a booking photograph of Ortega and "five others that look like him," with the same height, weight, bald head, similar facial features and skin tone. Ritchie testified she had shown the photographs to V.C. and T.E. a few days after the incident and asked if they recognized anyone. Each immediately identified Ortega. Ritchie did not remember whether she had informed the victims that the suspect's photograph might not be among those in the lineup. After the hearing at which Ritchie, V.C. and T.E. testified, the trial court denied Ortega's motion to suppress the identifications based on the photographic lineup and stated that "the identification process was not unduly suggestive. It did not in any manner taint any future identification." The court also determined the identification

by each witness was reliable under the factors set forth in *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972).[6]

¶30 Ortega asserts that because of his distinctive eye color and because he is the only person "set back" in the photograph, the lineup was unduly suggestive. But the record does not support Ortega's assertion, because at least two of the six men depicted in the photographs have light-colored eyes, and all have skin color, hair style, and hair color similar to Ortega. Nor does the record support his claim that eye color was the "primary physical characteristic that [V.C.] relied upon when choosing [his] photograph as the person who had assaulted her." Both V.C. and T.E. referred to Ortega's bald or shaved head as well as other physical characteristics in their testimony. And, although Ortega is slightly further back in his booking photograph than the other individuals, the visual impact is minimal, as the distance from the camera to each individual was not uniform.

¶31 Because any differences in the individuals' appearances were subtle, we cannot say the trial court abused its discretion in finding the lineup was not unduly suggestive and denying Ortega's motion. *See Dixon*, 153 Ariz. at 154, 735 P.2d at 764 (lineup not unduly suggestive when depicted all "males of similar ages," of same race,

[6]*Biggers* set forth factors to evaluate "whether under the 'totality of the circumstances,' the identification was reliable even though the confrontation procedure was suggestive." Here, although the trial court did not find the identification unduly suggestive, it made findings as to the reliability of the witnesses' identifications under the circumstances. The *Biggers* factors include: (1) the opportunity of the witness to view the suspect at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the suspect; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the commission of the offense and the confrontation. *State v. Lehr*, 201 Ariz. 509, ¶ 48, 38 P.3d 1172, 1184 (2002).

and with similar hair color to defendant); *see also Gonzales*, 181 Ariz. at 509, 892 P.2d at 845 ("[D]ifferent facial . . . hair thickness [will not] render a lineup impermissibly suggestive."); *State v. Via*, 146 Ariz. 108, 119, 704 P.2d 238, 249 (1985) (lineup not unduly suggestive despite fact defendant only subject with "the beginnings of a full beard"); *cf. State v. Henderson*, 116 Ariz. 310, 314-15, 569 P.2d 252, 256-57 (App. 1977) (lineup unduly suggestive where defendant twelve to sixteen years older than all others in lineup).

¶32 On appeal, Ortega also argues that the trial court should have precluded the victims from identifying him when they testified at trial, because their pre-trial identifications were unreliable. V.C., T.E., and V.C.'s daughter each unequivocally identified Ortega at trial. Although the court found T.E. and V.C.'s pre-trial identifications to be reliable in detailed findings, Ortega asks us to reweigh the factors set forth in *Biggers*, 409 U.S. at 199-200. But, because we agree with the trial court that the pre-trial identifications were not unduly suggestive, we need not undertake such an analysis. We cannot say the trial court abused its discretion in denying Ortega's motions.

Denial of Rule 20 Motion

¶33 Ortega next argues the trial court should have granted his motion for judgment of acquittal on the aggravated assault charge, and asserts the evidence fails to support the jury's verdict. A judgment of acquittal is appropriate only "if there is no substantial evidence to warrant a conviction." Ariz. R. Crim. P. 20(a); *State v. Fulminante*, 193 Ariz. 485, ¶ 24, 975 P.2d 75, 83 (1999). We review a trial court's denial of a Rule 20 motion for an abuse of discretion. *State v. Paris-Sheldon*, 214 Ariz. 500,

¶ 32, 154 P.3d 1046, 1056 (App. 2007). Likewise, our review of the sufficiency of the evidence underlying a conviction is limited to determining "whether substantial evidence supports the verdict." *State v. Sharma*, 216 Ariz. 292, ¶ 7, 165 P.3d 693, 695 (App. 2007). "'Substantial evidence is proof that reasonable persons could accept as sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt.'" *State v. Hall*, 204 Ariz. 442, ¶ 49, 65 P.3d 90, 102 (2003), *quoting State v. Spears*, 184 Ariz. 277, 290, 908 P.2d 1062, 1075 (1996).

¶34 Although Ortega acknowledges the admission at trial of his statement to police after his arrest: "I was snitched out. That fucking Mark snitched on me," he nevertheless argues on appeal that there is no substantial evidence from which a rational jury could link him to V.C.'s injuries. Ortega argues that "the only evidence placing [him] at [V.C.]'s residence the night of her attack was witness testimony," and argues that the pre-trial "constitutionally lacking photo lineup" and in-court identifications should have been excluded.

¶35 As stated above, there was no error in the admission of the victims' pre-trial and in-court identifications of Ortega. Both V.C. and T.E. positively identified Ortega as one of the people who entered their home, and V.C. consistently and positively identified Ortega as her attacker. The testimony of a single witness, if relevant and reliable, may be sufficient to support a conviction. *State v. Montano*, 121 Ariz. 147, 149, 589 P.2d 21, 23 (App. 1978). And, the credibility of witnesses and the weight to be given their testimony are exclusively matters for the jury. *See State v. Cox*, 217 Ariz. 353, ¶ 27, 174 P.3d 265, 269 (2007); *State v. Cañez*, 202 Ariz. 133, ¶ 39, 42 P.3d 564, 580 (2002). A reasonable

fact finder could view the evidence in this case to be substantial. As such, we defer to the trial court's assessment of the witnesses' testimony and evidence and find no error.

Motion for Mistrial

¶36 Finally, Ortega argues the trial court abused its discretion in denying his motion for a mistrial based on improper testimony by the state's DNA[7] analyst. The trial court granted Ortega's unopposed motion to preclude inconclusive test results on DNA from the police baton as they pertained to Ortega. At trial, the state's DNA analyst testified that the DNA sample had been "a mixture of at least three people," and when she compared it to "all the known samples in the case," she "could not exclude Mr. Ortega." Ortega objected and moved for a mistrial, arguing the state had been "instructed not [to] go into that." The court took the motion under advisement, struck the statement and instructed the jury not to consider it in their deliberations. After the jury had been excused for the day, Ortega renewed the motion and the trial court denied it. But, the next day, it instructed the jury that there was no evidence that Ortega had handled or touched the baton. On appeal, Ortega claims the expert's statement was highly prejudicial because (1) there was limited evidence otherwise connecting him to the crime; (2) the statement "gave the jurors the ability to picture [him], weapon in hand, attacking [T.E.] and/or [V.C.]"; and (3) it dispels his defense that he was not with the codefendants at V.C.'s trailer.

¶37 We review a trial court's denial of a motion for mistrial for an abuse of discretion. *See State v. Jones*, 197 Ariz. 290, ¶ 32, 4 P.3d 345, 359 (2000). Mistrial is

[7]Deoxyribonucleic acid.

the most dramatic remedy available to a trial court and should only be granted when justice otherwise would be thwarted. *See State v. Dann*, 205 Ariz. 557, ¶ 43, 74 P.3d 231, 244 (2003). Because the trial court is in the best position to determine whether a particular comment would prejudice a jury to an extent warranting a mistrial, "[w]hen a witness unexpectedly volunteers an inadmissible statement, the remedy rests largely within the discretion of the trial court." *State v. Marshall*, 197 Ariz. 496, ¶ 10, 4 P.3d 1039, 1043 (App. 2000). In determining whether to grant a mistrial, the court considers whether the testimony called the jurors' attention to matters they would not be justified in considering in reaching a verdict and the probability under the circumstances that the testimony influenced the jurors. *State v. Bailey*, 160 Ariz. 277, 279, 772 P.2d 1130, 1132 (1989).

¶38 Because Ortega's motion to preclude had been granted, the remarks by the state's witness "called to the attention of the jurors matters that they would not be justified in considering in determining their verdict." *Id.* When a witness unexpectedly volunteers information, the trial court must decide whether the jurors were influenced by the remarks, and "whether a remedy short of mistrial will cure the error." *Jones*, 197 Ariz. 290, ¶ 32, 4 P.3d at 359. Considering that the jury acquitted Ortega of the charges involving the baton, that three witnesses identified Ortega as one of the people in their home during the incident, and that the trial judge was in the best position to gauge the impact of the statements on the jury, we conclude that the trial court did not abuse its discretion by denying Ortega's motion for a mistrial.

Disposition

¶39 Ortega's convictions and sentences are affirmed.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Presiding Judge